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STATE OF WASHINGTON

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BY RONALD R. CARPENTER

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Supreme Court No. 83660-4

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

TIMOTHY L. JACKOWSKI and ERI JACKOWSKI, husband and wife,

Appellants,

vs.

DAVID BORCHELT and ROBIN BORCHELT, husband and wife;
HAWKINS POE, INC., dba Coldwell Banker Hawkins-Poe Realtors;
HIMLIE REALTY, INC., VINCE HIMLIE, broker for Windermere
Himlie Real estate, real estate brokers, and ROBERT JOHNSON and JEF
CONKLIN, real estate agents,

Respondents.

SUPPLEMENTAL BRIEF OF PETITIONERS
BORCHELT RESPONDING TO:
EASTWOOD v. HORSE HARBOR FOUNDATION
and
AFFILIATED FM INS. CO. v. LTK CONSULTING SERVICES, INC.

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I. INTRODUCTION

Respondents Borchelt submit this supplemental brief pursuant to authorization by this Court to address *Affiliated FM Ins. Co. v. LTK Consulting Services, Inc.*, ___ Wn.2d ___, 243 P.3d 521 (November 4, 2010), and *Eastwood v. Horse Harbor Foundation, Inc.*, ___ Wn.2d ___, 241 P.3d 1256 (November 4, 2010).

II. STATEMENT OF THE CASE

Borchelts' statement of the case, as set forth in prior briefing, remains unchanged.

III. ARGUMENT

The decisions in *Affiliated* and *Eastwood* do not alter or undermine issues 2 and 3 raised by the Borchelts in their petition for review before this court. These decisions do not address the error made by the Court of Appeals in holding Chapter 64.06 RCW ("Form 17") disclosures provide a basis for a negligent misrepresentation claims, nor do the decisions alter or undermine Borchelts' fill-related position and arguments regarding the improper shift of the burden of proof by the Court of Appeals.

First, as set forth in detail in prior briefing, Division Two erred when it held that sellers of residential real property are liable in equity for

rescission based upon negligent misrepresentation where the only representations were made pursuant to Chapter 64.06 RCW ("Form 17") disclosures. Such a holding is directly contrary to the statutory scheme which explicitly provides that the seller of residential real property shall not be liable for any error, inaccuracy or omission unless the seller had actual knowledge of the error, inaccuracy, or omission. RCW 64.06.050 (emphasis added). The holding entirely nullifies the three day rescission period of RCW 64.06.030 and allows a purchaser to rescind a closed real estate transaction for negligent errors in a Form 17 disclosure years after the sale.

Second, Division Two erred when it ruled that there was a genuine issue of fact as to whether presence of fill would have been disclosed with careful, reasonable inspection at time of sale, where the Jackowskis failed to raise such any such issue in the court. To defeat Borchelt's motion for summary judgment, Jackowskis had the affirmative burden of establishing that Borchelts had actual knowledge of the fill, failed to disclose the same, and that a reasonable inspection of the property would fail to disclose its presence. Jackowski's claims fail on two counts. First, they failed to establish that Borchelts had knowledge of the fill. As to the fill being hidden, the only evidence before the trial court and the Court of Appeals was that the presence of fill was obvious. Jackowskis failed to set forth

any evidence whatsoever to support a claim to the contrary. It was improper for Division Two to speculate that certain fill-related facts might exist to support claims of fraud and fraudulent concealment, where such facts were not set forth anywhere in the record.

Third, Borchelts seek a determination regarding whether Chapter 64.06 precludes a breach of contract claim based solely on Form 17 disclosures, in light of the clear statutory directive that the mandated disclosure statement is not part of any written agreement between buyer and seller. RCW 64.06.020. All breach of contract claims raised by Jackowski are founded on the Form 17 disclosure statement. Those claims were properly dismissed by the trial court on summary judgment and Division Two erred in reversing on this issue.

Eastwood does clarify that the mere existence of a contract does not bar recovery in tort if the injury is traceable to a breach of tort independent of the contract. However, a significant corollary is that where there is no independent tort duty, there is no tort remedy. The claims in the present case that were dismissed based on the economic loss rule were properly dismissed under the analytical framework set forth in *Eastwood*, particularly when considered in the context of Borchelts' arguments regarding the Chapter 64.06 RCW ("Form 17") disclosures. As detailed in

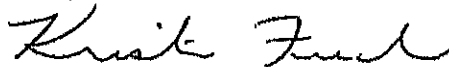
prior briefing, Borchelts made no representations whatsoever beyond those disclosures set forth on the "Form 17."

VI. CONCLUSION

As set forth herein, Borchelts respectfully direct the Court to Borchelts' argument, analysis and relief requested in Borchelts petition for review and prior briefing, as the relief requested is not affected by the recent *Affiliated* and *Eastwood* decisions with respect to certain fundamental issues raised by Borchelts, and remains valid with respect to those issues to which *Affiliated* and *Eastwood* pertain.

Respectfully submitted this 7th day of January, 2010.

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BY RONALD R. CARPENTER

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Supplemental Brief, by electronic transmission to the parties as agreed prior to

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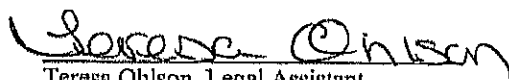
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